87-1688

Supreme Court, U.S.
FILED
MAR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JOHN COMER OWEN

and BESSIE B. OWEN, PETITIONERS,

CITY OF SPRINGFIELD, MISSOURI,

A MUNICIPAL CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

A P P E N D I X

JOHN G. NEWBERRY

Attorney of Record for Petitioners

Suite 203, 2135 East Sunshine

Springfield, MO 65804

417-883-5535

INDEX TO APPENDIX

JUDGE'S DOCKET SHEET

IN THE

CIRCUIT COURT OF GREENE COUNTY, MISSOURI

CASE NO. CV180-1990-CC-¼4

NATURE OF ACTION: DAMAGES

PLAINTIFF(S) PETITIONER(S)

JOHN COMER OWEN and

BESSIE OWEN

ATTORNEY

JOHN B. NEWBERRY

DEFENDANT(S) RESPONDENT(S)

CITY OF SPRINGFIELD

GARNEY CO., INC.

FRANK COLUCCIO CONSTRUCTION CO.

SHAWNEE CONSTRUCTION CO.

ATTORNEY

LYNN RODGERS

WARREN STAFFORD

CRAIG OLIVER

DATE	ENTRY
09-10-80	Petition filed. Summons issued to Shf. of Greene County, MO.
09-12-80	Summons returned with service on City of Springfield, September 11, 1980. bw
10-09-80	Defendant's Motion to Dismiss; Motion for More Definite & Certain & Motion for Costs filed. bw
06-18-81	Entry of Appearance of Schroff, Glass & Newberry on behalf of the Plaintiffs & Notice filed. bw
06-19-81	Counter-Affidavit to Defendant's Motion for Cost filed.
07-20-81	All Motions to Dismiss, to Make More Def. & Cert. & for Costs-- Overruled. Deft. given 30 days to plead. JP

DATE	ENTRY
-08-81	Plaintiffs' Motion for Joinder of Additional Defendants & Motion for Leave to File Amended Petition for Damages filed. bw
09-22-81	Plfts Motion for Joinder of Add. Defts. & to Amend Petition, sustained. City granted 30 days to answer. bw
09-30-81	Amended petition filed. BH
10-02-81	Summons issued to shf of Jackson County, MO and to shf. of City of St. Louis, MO. RH
10-13-81	Summons returned with service on Garney Companies, Inc., October 8; Frank Coluccion Construction Co., October 7 & Shawnee Constr. Co., October 8, 1981. bw
10-29-81	Separate Motion of Defendant Garney Companies, Inc. for More

DATE	ENTRY
	Definite Statement & Motion of Defendant City of Springfield for More Definite Statement filed. bw
0-30-81	Defendant Shawnee Construction, Inc.'s Motion to Dismiss; Motion for Costs & Motion to Make More Definite & Certain filed. Defendant Frank Coluccio Construction Co.'s Motion to Dismiss; Motion for Costs &Motion to Make More Definite & Certain filed. bw
1-09-81	Plaintiffs' Notice filed. bw
11-10-81	Counter-Affidavit/to Motions for Costs of Defendants Frank Colucci Construction Company & Shawnee Construction, Inc. filed. bw

DATE	ENTRY
12-02-81	Pltfs' First interrogatories to Deft Frank Coluccio Const. Co. and Request for production of documents filed. Pltfs' first production of documents filed. Pltfs' first interrogatories to Deft Shawnee Construction, Inc. and Request for Production of Documents filed. /cw
12-16-81	Plft. appears by Counsel. Lyndell Porterfield appears for City. Shawnee Construction Co. & Frank Coluccio, defts. atty waives appearance. Atty Lynn Rodgers appears on behalf of Deft. Garney Companies & the City. Motion of Deft. Frank Coluccio Const. Co. to Make More Definite -- over-ruled. Motion

DATE	ENTRY
	of Deft. Frank Coluccio Const. Co. for Costs -- over-ruled. Motion of Deft. Frank Coluccio Const. Co. to Dismiss -- over-ruled. Motion of Deft. Shawnee Const. Co. to Make More Definite -- over-ruled. Motion of Deft. Shawnee Const. Co. to Dismiss -- overruled. Motion of Deft. Shawnee Const. Co. for Costs -- over-ruled. Motion of Defendant Garney Companies for More Def. Statement -- over-ruled. Motion of Deft. City for More Def. Statement -- over-ruled. All parties given 20 days to plead further. /cw
12-18-81	Defendant Garney Companies' Motion for Protective Order;

DATE	ENTRY
	Objection to Plaintiffs' First Interrogatories & Response to Plaintiffs' Request for Production of Documents filed. bw
01-06-82	Separate Answer of Defendant Shawnee Construction, Inc. to Amended Petition & Separate Answer of Defendant Frank Coluccio Construction Co. to Amended Petition filed. bw
01-11-82	Separate answer of Deft City of Springfield to pltfs' amended petition for damages filed. /cw
02-09-82	Plfts. appear by atty. Deft. Garney Companies & City of Spfld appear by Counsel. Deft Garney Company, Inc's objections to pltfs' Motion to Produce overruled based upon amendments

DATE	ENTRY
	to the requests made. Court rules in open court on objections to interrogatories. Deft. given 30 days within which to answer and produce. /cw
03-30-82	Plaintiffs' Request for Production of Documents to Defendant City of Springfield, Missouri, filed. blj
04-19-82	Defendant City of Springfield's Response to Plaintiffs' Request for Production of Documents and Defendant City of Springfield's Answer to Plaintiffs' First Interrogatories filed. blj
-16-82	Defendants Frank Coluccio Construction Company and Shawnee Construction, Inc.'s Interrogatories to Plaintiffs filed. blj

DATE	ENTRY
-25-82	Responses of Defendant, Garney Companies, Inc. to Plaintiffs' Request for Production of Documents filed. blj
06-29-82	Defendant Shawnee Construction, Inc.'s Answers to Plaintiffs' First Interrogatories and Defendant Frank Coluccio Construction Company's Answers to Plaintiffs' First Interrogatories filed. blj
-18-82	Plaintiffs' Motion for Leave to File Second Amended Petition for Damages filed. blj
08-25-82	Attorneys J G Newberry, Rodgers & Handley appear on motion for leave to file Second Amended Petition for Damages. Said

DATE	ENTRY
	motion is sustained. Defts granted 30 days to respond. blj
09-07-82	Defendant, City of Springfield's Motion to Dismiss or in the Alternative, to Strike filed. blj
09-14-82	Separate Motion of Defendant Garney Companies, Inc. to Dismiss or in the Alternative, to Strike and Motion for More Definite Statement filed. blj
-24-82	Separate Motion of Defendant Frank Coluccio Construction Company for More Definite Statement; Separate Motion of Shawnee Construction Inc. to Dismiss or in the Alternative, to Strike;Separate Motion of Defendant Shawnee Construction Inc. for More Definite Statement

DATE	ENTRY
	and Separate Motion of Frank Coluccio Construction Company To Dismiss or in the Alternative, to Strike filed. blj
-27-82	Plaintiffs' Notice filed. blj
10-06-82	Pltfs appear by atty John Newberry. City of Springfield appears by counsel, Garney Co., Inc. appears by counsel, Frank Coluccio Construction Company and Shawnee Construction Company appear by counsel. Motions to dismiss filed by defts, Motion to strike filed by defts. Motion to make more definite and certain filed by defts presented to the court. Court sustains motion of City of Springfield as to treble damages alleged in Count 2. City

DATE	ENTRY
	of Springfields liability under Count 2 is limited to actual damages.
10-07-82	All motions to strike filed by defts against pltfs overruled. All motions to dismiss filed by defts overruled. All motions to make more definite and certain pltfs pleadings overruled, except as to Count 5. Counts of paragraph 3 of Count 5 may be a typographical omission but at the present time represents no allegation in the court's view. Blj
11-12-82	Plaintiffs' Amendment of Paragraph 3 of Count V of Second Amended Petition for Damages filed. blj

DATE	ENTRY
11-18-82	Separate Answer of Defendant Garney Companies, Inc. to Plaintiffs Second Amended Petition for Damages filed. blj
11-23-82	Interrogatories of Defendant Garney Companies, Inc. to Plaintiffs filed. blj
11-30-82	Separate Answer to Defendant Shawnee Construction, Inc. to Plaintiffs' Second Amended Petition for Damages and Separate Answer of Defendant Frank Coluccio Construction Company to Plaintiffs' Second Amended Petition for Damages filed. blj
12-03-82	Separate Answer of Defendant City of Springfield to Plaintiffs' Second Amended Petition for Damages filed. blj

DATE	ENTRY
12-06-82	Plaintiffs' Answers to Interrogatories of Defendants Frank Colucc Construction Company and Shawnee Construction, Inc. filed. blj
12-13-82	Answers of Defendant Garney Companies, Inc. to Interrogatories of Plaintiff filed. blj
12-20-82	Defendant Garney Companies, Inc.'s Motion to Produce filed. blj
01-05-83	Plaintiffs' Notice filed. blj
02-15-83	Pltfs appear by attorney John G. Newberry. Deft Garney Companies Inc., appears by attorney Lynn Rodgers. Motion for production of documents argued. Court requests suggestions. Attorneys

DATE	ENTRY
	to submit suggestions by February 22, 1983, and then court to rule. blj
02-28-83	Suggestions in Support of Defendant's Motion to produce filed. bl
03-03-83	Deft. Garney Companies, Inc.'s motion to produce is overruled at this time. blj
03-03-83	Suggestions in Opposition to Motion to Produce of Garney Companies Inc. filed. blj
03-11-83	Petitioner's Notice to Take Deposition filed. blj
03-14-83	Plaintiff present by atty John B. Newberry. Deft. Coluccia present by atty C. Oliver, Deft Garney present by atty L. Rodgers. Motion for Protective Order

DATE	ENTRY
	granted quashing Notice for Deposition of John Meck to be taken on March 15 at Portland, Oregon. The Court defers ruling on Motion to Shorten Time for Taking Witness's Deposition. Judge of Div. 2 acting for Judge of Div. 1.
03-14-83	Plaintiff's Protective Order filed. blj
03-15-83	Case is passed at docket call at the request of the City of Springfield. Blj
04-13-83	Defendant, City of Springfield's Motion for Partial Summary Judgment as to Count VI and Count VIII and Suggestions in Support of Defendant's Motion for Partial Summary Judgment as

DATE	ENTRY
	to Count VI and Count VIII filed. blj
04-28-83	Defendant, City of Springfield's Notice filed. blj
05-05-83	Attorneys Craig Oliver, Bob Handley, J. G. Newberry, and Bill McDonald appear on Motion for Partial Summary Judgment on two counts. Court defers ruling on said motion. Attorneys agree that all discovery, including the filing of any motions for summary judgment, shall be completed within 60 days. Court to set the case as special setting in late September or October.
06-08-83	Notice to Take Depositions-

DATE	ENTRY
	Plaintiffs' Expert Witness filed. blj
-14-83	Defendant's First Request for Admissions of Fact filed. mj
-23-83	Plaintiff's Response to Request for Admissions of Fact of Defendant, City of Springfield, Missouri, filed. bjs
-07-83	Defendant Garney Companies, Inc.'s Application for Continuance and Notice filed. bjs
-21-83	Depositions of John Owen & Bessie Owen, on behalf of defts, taken Alpa Reporting Service filed. bw
-28-83	Plaintiffs' Answers To Interrogatories Of Defendant Garney Companies, Inc. filed. PJ
07-28-83	Defendant Deposition of Mrs. Helen Bass taken on behalf of

DATE	ENTRY
	Defendants. Freeman and Associates, Court Reporting. Filed. PJ
08-08-83	Attorneys John G. Newberry, McDonald and Oliver appear on Motion for Continuance. Court defers ruling and will take up matter again on 8-19-83 at 8:45 a.m. PJ
08-19-83	Court has conference with attorneys. Motion for continuance sustained. Case reset for trial without fail on Dec. 5, 1983. Motion for summary judgment to be filed by defts will be heard on 9-26-83 at 8:30 A.M. Court makes other orders concerning discovery schedule in memorandum for file. jh

DATE	ENTRY
09-12-83	Separate Motion of Deft Garney Companies, Inc. for Summary Judgment filed. rl
09-12-83	Defts' Shawnee Construction and Frank Coluccio Construction Co's Motion for Summary Judgment and Preliminary Suggestions in Support of Motion of Deft's Shawnee Construction and Frank Coluccio Construction Company for a Summary Judgment filed. rl
09-19-83	Defendants Further Suggestions In Support Of Motion Of Defendants Shawnee Construction And Frank Coluccio Construction Company For A Summary Judgment, Filed. PJ
09-24-83	Plfts appear and file Suggestions against Summary Judgment.

DATE	ENTRY
09-24-83	Deft City appears by Counsel & argues Motion for Summary Judgment. Court takes motion under advisement.
09-30-83	Court filed formal Ruling on Request for Summary Judgment. PJ
10-12-83	Court permits Defts Coluccio Const. & Shawnee & Garney Companies to reargue Motion for Summary Judgments. Court overrules all motions for summary judgment, except court sustains motion of Garney Companies, Inc., Frank Coluccio Construction Company, and Shawnee Construction Company, defts, as to Count 8. The sustaining of said motions does not include City of Springfield, Mo.

DATE	ENTRY
	Discovery to be made by parties is extended to Nov. 23, 1983.
10-21-83	Plaintiffs' Supplemental Answers To Interrogatories of Defendant Garney Companies, INc. filed. PJ
11-01-83	Deft. City of Springfield's Application for Change of Judge filed. R
11-09-83	Deft. City of Springfield's Application for Change of Judge sustained. Cause assigned to Circuit Judge of Div. 4.
11-09-83	Case received in Division 4, and scheduled for special Jury Trial, Mon. Jan. 30, 1984, at 9;00 a.m. with 5 days allowed for trial. Parties notified by letter. PJ

DATE	ENTRY
11-15-83	Defendants Frank Coluccio Construction Company and Shawnee Construction, Inc.'s Notice of Hearing and Motion for Continuance filed. Plj
11-22-83	Pltfs. appears by Atty. John B. Newberry. Deft. Frank Coluccio and Deft. Shawnee Construction appears by Atty. Craig Oliver. Deft. Garney appears by Atty. Lynn Rodgers. Defts. Coluccio and Shawnee's Motion for Continuance sustained, and especially set by the court the week of February 6, 1984, with 5 days allowed for trial. BJ
12-28-83	Defendant Garney Companies, Inc.'s Request for Admissions to Plaintiffs filed. BJ

DATE	ENTRY
01-03-84	Defendant Garney Companies, Inc.'s Notice of Deposition filed. BJ
01-09-84	Plaintiffs' Response to Request for Admission of Defendant Garney Companies, Inc. filed. Kys
01-13-84	Plaintiffs' Notice of Deposition filed. Kys
01-27-84	Defendant, Frank Collucio, Entry of Appearance filed.
01-27-84	Defendant Shawnee Construction, Inc.'s Supplemental Answers to Plaintiffs' First Set of Interrogatories filed. KS
01-30-84	Defendant Frank Coluccio Construction Company's Supplemental Answers to Plaintiffs First Interrogatories filed. KS

DATE	ENTRY
01-30-84	Supplemental Answers of Defendant, Garney Companies, Inc., to Plaintiffs' Interrogatories filed. KS
01-31-84	Motion to Strike Supplemental Interrogaroty Answers of Shawnee Construction, Inc., Garney Companies, Inc., and Frank Coluccio Construction Company, Motion To Shorten Time, and Notice filed. KS
02-01-84	Pltf. appears by John B. Newberry, John G. Newberry. Deft. City appears by Atty. Bob Handley. Deft. Garney appears not. Deft. Coluccio appears by Atty. Warren Stafford. Deft. Shawnee appears by Atty. Craig Oliver. Pltf's Motion to Strike

DATE	ENTRY
	Supplemental Interrogatory Answers of Shawnee Construction, INc., Garney Companies, INc., and Frank Coluccio Constrcution Company, sustained. Motion To Shorten Time sustained. KS
02-01-84	Defendant Shawnee Construciton, Inc.'s Additional Supplemental Answers Plaintiffs' First Set of Interrogatories filed. KS
02-02-84	Pltfs. appear by Atty. John B. Newberry. Deft. Garney appears by Atty. Lynn Rogers. Pltfs' Motion to Strike Supplemental Interrogatory Answers of Shawnee Construction, INc., Garney Companies, Inc, and Frank Coluccio Construction Co., Sustained. KS

DATE	ENTRY
02-02-84	Defendant's Motion To Shorten Time, Motion In Limine, Suggestions in Support of Defendant City of Springfield's Motion in Limine, and Notice filed. KS
02-02-84	Defendant, Garney Companies, Inc's., Motion in Limine filed. KS
02-03-84	Pltfs. appear by Atty. John G. Newberry. Deft. City appears by Atty. Robert Handley. Deft. Shawnee appears by Atty Craig Oliver and Frank Evans. Deft. Garney appears by Atty. William McDonald. Deft. Coluccio appears by Atty. Warren Stafford. Pretrial conference held. Deft's Shawnee Construction,

DATE	ENTRY
	INc's Motion in Limine filed. Deft. Frank Coluccio Construction Company's Motion in Limine, filed. KS
02-06-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appears by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appears by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio Inc. appears by Frank Coluccio and Atty. Warren Stafford. Deft. Shawnee Construction Co. appears by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. Defts. Motions in Limine overruled, except Defts. Garney

DATE	ENTRY
	and Shawnee's Motion sustained in part in that Pltf. ordered not to offer evidence of amount of medical expense or claim damages for same. Parties announce ready for trial. Rule invoked as to witnesses. Voir dire examination of prospective jurors conducted. Jury of 12 regular jurors and 2 alternates selected and sworn. Instruction #1 read to jury. Pltf. and Deft. City make opening statements. Recess until 9:00 a.m., Feb. 7, 1984. KS
-07-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appears by Henry Cole and Atty. Robert Handley. Deft. Garney Co.

DATE	ENTRY
	appears by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appears by Frank Coluccio and Atty. Warren Stafford. Deft. Shawnee Construction Co. appears by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. Pltfs. file written Motion for Directed Verdict and the same is overruled. Opening statements made by Deft. Garney. Opening Statements made by Deft. Coluccio. Opening statements made by Deft. Shawnee. Evidence adduced by Pltf. Recess until 9:00 a.m., Feb. 8, 1984. KS
-08-84	Pltfs. appear in person and by Attys. John B. and John G.

DATE	ENTRY
	Newberry. Deft. City appears by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appears by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appears by Frank Coluccio and Atty. Warren Stafford. Deft. Shawnee Construction Co. appears by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. By agreement of the parties regular juror Betty Lindsey is designated as the second alternate and alternate juror Helen Miller is designated as a regular juror. Further evidence adduced by Pltf. Recess until 9:00 a.m., Feb. 9, 1984. KS

DATE	ENTRY
02-09-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appears by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appears by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appears by Frank Coluccio and Atty. Warren Stafford. Deft. Shawnee Construction Co. appears by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. Further evidence adduced by Pltf. Recess until Feb. 10, 1984. KS
-10-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appears by Henry Cole and Atty. Robert

DATE ENTRY

Handley. Deft. Garney Co. appears by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appears by Frank Coluccio and Atty. Warren Stafford. Deft. Shawnee Construction Co. appears by Michael Bacelwatz and Attys. Frnak Evans and Craig Oliver. Pltf. rests. Evidence adduced by Deft. Coluccio out of turn. Recess until Feb. 13, 1984.

-13-84 Pltfs. appear in person and by Atts. John B. and John G. Newberry. Deft. City appears by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appear by Glena Todd and Attys. William McDonald and Lynn

DATE ENTRY

Rogers. Deft. Frank Coluccio appears by David Baker and Atty. Warren Stafford. Deft. Shawnee Construction Co. appear by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. Motion to Re-open Pltf's Case as to Count VIII filed with the Court. Pltfs. Motion for leave to Amend Second Amended Petition for Damages by Adding Additional Count, overruled. Supplemental Answers of Shawnee Construction, INc. to Pltfs. Interrogatories, filed. Arguments heard on Pltf's Motion to Re-Open and the same is sustained. Evidence adduced by the Pltfs. as to Count VIII. Pltf. rests. Separate Motion of

DATE	ENTRY
	Deft. City of Springfield for Directed Verdict at the close of Pltfs' Case In Chief, filed, and the same is overruled. Motion for Directed Verdict by Deft., Garney Co. Inc. at the close of Pltfs. evidence and the same is overruled. Deft. Frank Coluccio Construction Co.'s Motion For Directed Verdict at the Close of Pltfs' Evidence in Chief filed, and the same is overruled. Motion for Directed Verdict by Deft. Shawnee Construction, INc. at the Close of Pltfs' Evidence filed, and the same is overruled. Evidence adduced by Deft. Coluccio. Recess until February 14, 1984. KS

DATE	ENTRY
-02-84	Interrogatories to Garnishee filed. KS
02-14-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appear by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appear by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appears by David Baker, and Atty. Warren Stafford. Deft. Shawnee Construction Inc. appear by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. Deft. Coluccio rests. Deft. City's offer of Proof, denied. Evidence adduced by the City.

DATE	ENTRY
	Deft. City rests. Recess until Feb. 15, 1984.
02-15-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appear by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appear by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appear by David Baker and Atty. Warren Stafford. Deft. Shawnee Construction INc., appear by Michael Bacelwatz and Attys. Frank Evans and Craig Oliver. Evidence adduced by Deft. Garney to the conclusion thereof. Evidence adduced by Deft. Shawnee to the conclusion thereof.

DATE	ENTRY
	Rebuttal arguments made by Pltf. Both parties rest. Recess until 2/16/84. KS
02-16-84	Pltfs. appear in person and by Attys. John B. and John G. Newberry. Deft. City appear by Henry Cole and Atty. Robert Handley. Deft. Garney Co. appear by Glena Todd and Attys. William McDonald and Lynn Rogers. Deft. Frank Coluccio appear by David Baker , and Atty. Warren Stafford. Deft. Shawnee Construction Inc., appear by Michael Bacelwatz and Attys. Frank Evans. Separate Motion of Defendant City of Springfield for Directed Verdict at the close of all the evidence

DATE ENTRY

in the case, Motion For Directed Verdict of Deft. Garney Co., Inc., at the Close of all the Evidence, Deft. Frank Coluccio Construction Co., Motion for Directed Verdict at the close of all the Evidence, Motion for Directed Verdict by Deft. Shawnee Construction, INc., at the Close of the Evidence filed and the same are overruled. Instructions number 2 through 44 read to the jury. Closing arguments made by Pltfs. Closing arguments made by Deft. City. Closing arguments made by Deft. Garney. Closing arguments made by Deft. Coluccio. Closing arguments made by Deft. Shawnee. Jury retires to

DATE ENTRY

deliberate on its verdict at 3:02 p.m. At 6:42 p.m., the jury returns and at 6:44 p.m. jury returns to jury room. At 6:57 p.m., the jury returns to the courtroom and announces that they have reached a verdict. Verdict "A", handed the Court reads:"On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for treble damages against defendant Frank Coluccio Construction Company, We, the undersigned jurors, find in favor of Frank Coluccio Construction," signed, C.L. Leeseberg, Connie Meyer, Betty Hoover, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill, Steven M.

DATE ENTRY

Jesse, Wanda Morgan, Donna C. Jennings.

Verdict "B", "On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for treble damages against defendant Shawnee Construction, INc., We, the undersigned jurors, find in favor of: Shawnee Construction," signed, Wanda Morgan, C.L. Leeseberg, Helen R. Miller, Betty Hoover, Ruth Ann Langston, Sam Holland, Connie Meyer, Jerry Johnson, Marjorie Hill, Steven M. Jesse.

Verdict "C", "On the claim of plaintiffs John Comer Owen and Bessie E. Owen for treble damages against defendant Garney

DATE ENTRY

Companies, INc., we, the undersigned jurors, find in favor of: Garney Companies, Inc." signed, C. L. Leeseberg, Helen R. Miller, Connie Meyer, Wanda Morgan, Betty Hoover, Jeff Grayless, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill.

Verdict "D","On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for trespassing against defendants Frank Coluccio Construction Company and City of Springfield, Missouri, we the undersigned jurors, find in favor of: Frank Coluccio anad City of Springfield," signed C.L. Leeseberg, Connie Meyer, Helen R.

DATE ENTRY

Miller, Wanda Morgan, Betty Hoover, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill.

Verdict "E", "On the claim of plaintiffs John Comer Owen and Bessie E. Owen for trespassing against defendants Shawnee Construction, Inc., and City of Springfield Missouri, we, the undersigned jurors, find in favor of: Shawnee Constr. and City of Spfld.", signed, Connie Meyer, Wanda Morgan, Jeff Grayless, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill, Steven M. Jesse, Donna C. Jennings, Helen K. Miller.

DATE ENTRY

Verdict "F", "On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for blasting damages against defendants Garney Companies., INc., and City of Springfield, Missouri, we, the undersigned jurors, find in favor of: john & Bessie Owen. We, the undersigned jurors, assess the damages of plaintiffs John Comer Owen and Bessie E. Owen at $3,500.00," signed, Jeff H. Grayless, Helen R. Miller, Donna C. JEnnings, C.L. Leeseberg, Marjorie Hill, Sam Holland, Jerry Johnson, Betty Hoover, Ruth Ann Langston.

Verdict "G", "On the claim of plaintiffs John Comer Owen and

DATE ENTRY

Bessie E. Owen for blasting damages against defendants Shawnee Construction, Inc., and City of Springfield, Missouri, we, the undersigned jurors, find in favor of Shawnee Construction, Inc.", signed, Connie Meyer, Wanda Morgan, Betty Hoover, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill, Steven M. Jesse, Donna C. JEnnings, C. L. Leeseberg.

Verdict "H", "On the claim of plaintiffs John Comer Owen and Bessie E. Owen for temporary nuisance against defendants Frank Coluccio Construction Co. and City of Springfield, Missouri, we, the undersigned

DATE ENTRY

jurors, find in favor of: Frank Coluccio Constr. Co.", signed, Connie Meyer, Wanda Morgan, Betty Hoover, Helen R. Miller, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill, Steven M. Jesse, C. L. Leeseberg.

Verdict "I", "On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for temporary nuisance against defendants Garney Companies, Inc. and City of Springfield, Missouri, we the undersigned jurors, find in favor of: Garney Companies, Inc.', signed, Connie Meyer, Helen R. Miller, Wanda Morgan, Betty Hoover, Jeff Grayles, Ruth Ann Langston, Sam Holland Jerry,

DATE	ENTRY
	Johnson, Marjorie Hill, C.L. Leeseberg.
	Verdict "J", "On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for temporary nuisance against defendants Shawnee Construction, Inc., and City of Springfield, Missouri, we, the undersigned jurors, find in favor of: Shawnee Construction, Co.", signed, Connie Meyer, Wanda Morgan, Betty Hoover, Helen R. Miller, Jeff Grayless, Ruth Ann Langston, Sam Holland, Jerry Johnson, Marjorie Hill, C.L. Leeseberg.
	Verdict "K', "On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for loss of water

DATE ENTRY

in the Ward Branch against defendants Shawnee Construction, INc., and City of Springfield, Missouri, we the undersigned jurors, find in favor of: John & Bessie Owen. We, the undersigned jurors, assess the damages of plaintffs John Comer Owen and Bessie E. Owen at $2,150.00," signed, Jeff H. Granless, Helen R. Miller, Donna C. Jennings, C.L. Leeseberg, Marjorie Hill, Sam Holland, Jerry Johnson, Betty Hoover, Ruth Ann Langston.

Verdict "L", " On the Claim of plaintiffs John Comer Owen and Bessie E. Owen in Count VIII for permanent nuisance against

DATE	ENTRY
	defendant City of Springfield, Missouri, we the undersigned jurors, find in favor of: John & Bessie Owen. We, the undersigned jurors, assess the damages of plaintiffs John Comer Owen and Bessie E. Owen at $40,875.00," signed, Connie Meyer, Jeff H. Grayless, Steven M. Jesse, Helen R. Miller, Donna C. Jennings, C.L. Leeseberg, Wanda Morgan, Marjorie Hill, JErry Johnson, Betty Hoover, Ruth Ann Langston, Sam Holland. Jury discharged. KS
03-02-74	Motion of Defendant Shawnee Construction, INc. for Judgment NOV, filed. KS

DATE	ENTRY
03-02-84	Plaintiffs' Motion for New Trial, filed. KS
03-02-84	Deft's City Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for New Trial, filed. KS
-06-84	Depositions of John A. Meck taken by Beovich & Rozycki, Inc. on behalf of Plaintiff's. KS Depositions of Mark Elliott Slack taken by Bearden Court Reporting on behalf of Defendant. KS
03-16-84	This case scheduled for hearing on all pending motions, Thurs., Apr. 19, 1984, at 10:00 a.m., as back-up to civil jury week, and with the time not to exceed 1

DATE	ENTRY
	hr. Attys.notified by letter of this setting. JK
-19-84	Pltfs. appear by Attys John G. and John B. Newberry. Deft. City appears by Atty. Robert Handley. Deft. Shawnee appears by Atty. Frank Evans. Deft. Garney appears by Attys. William McDonald and Lynn Rogers. Deft. Collucio appears by Atty. Warren Stafford. Arguments heard on after trial motions. Pltfs. motion for New Trail, and Defts. Motion for New Trial, overruled. Deft. Shawnee's MOtion for Judgment N.O.V., overruled. Deft. Garney's Motion for Costs sustained. Atty. William

DATE	ENTRY
	McDonald to prepare proposed judgment. JK
-27-84	Notice of Appeal filed. Copies mailed to the appropriate parties May 3, 1984. JK
-27-84	Notice of Appeal filed. Waiting for a list of where to send the copies. KS
-30-84	Notice of Appeal filed. Copies mailed to the appropriate parties.
-03-84	Certified returened receipt dated Tina Bush, Daralina Hodge, D.K. YOung and J. McLead dated May 2, 1984. KS
05-07-84	Notice of Appeal filed 4-27-84; copies sent this date. KS
05-09-84	Judgment entered and filed. KS

DATE	ENTRY
-02-84	Interrogatories to Garnishee filed.

IN THE MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

DIVISION ONE

Nos. 13749 and 13753

(consolidated)

F I L E D

DEC 8 1986

JOHN COMER OWEN and
BESSIE E. OWEN,

Plaintiffs (Respondents
and Cross Appellants),

vs.

CITY OF SPRINGFIELD, MISSOURI,
a municipal corporation,

Defendant (Appellant
and Cross Respondent),

and

FRANK COLUCCIO CONSTRUCTION COMPANY,
a Washington corporation,

Defendant (Respondent).

APPEALS FROM THE

CIRCUIT COURT OF GREENE COUNTY, MISSOURI

Honorable Max E. Bacon, Judge

AFFIRMED

John Comer Owen and Bessie E. Owen recovered a jury verdict against the City of Springfield, for $40,875 damages upon their claim that the City's sewage lift station constituted a permanent nuisance. The City appeals (number 13749) from the ensuing judgment.

Plaintiffs Owen appeal (number 13753) from a part of the same judgment denying their claim for damages for temporary nuisance against the City of Springfield and Frank Coluccio Construction Company.

We take up the City's appeal first, then that of the Owens.

The lift station was located upon an irregularly shaped tract of somewhat less

than one and a half acres which had been carved out of plaintiffs' farm, across the road and approximately 100 yards distant from their residence. This tract had been secured by the City under its power of eminent domain.

The facility employs two 400-horsepower electric motor powered pumps which operate alternately and force untreated sewage through an inclined 24-inch force main a distance of 13,000 feet to a higher elevation. The pumps operate from 6 to 24 hours per day. There is also a 185 horsepower diesel generator for emergency electric power in case of interruption of the primary electricity source. It is operated for testing once each week. There are also various other fans and pumps. The sewage from a large geographic area collects by gravity in a large open

reservoir at the lift station, known as a "wet well." From the wet well it is pumped into the force main. The machinery is housed in a brick structure which from the surrounding ground level appears to be set upon a graded and sodded mound.

The condemnation suit had seen filed by the City on December 30, 1977. Commissioners had been appointed and had filed a report on April 28, 1978. The report fixed the damages to plaintiffs for the lift station and force main at $22,651.

Plaintiffs filed exceptions to the report. Four years passed and the case had not been tried. In the meantime the lift station was constructed and was placed in operation in January, 1981. It began at once to emit foul odors and its engines operated noisily. The Owens filed

the present suit for damages for permanent nuisance. Their condemnation exceptions were still pending and the two lawsuits proceeded side by side for eight months. Then the Owens on June 10, 1982, dismissed their exceptions in the condemnation suit. The City had not filed exceptions to the commissioners' report, so the Owens' dismissal of their exceptions terminated the condemnation suit.

The permanent nuisance case proceeded. The City after termination of the condemnation proceeding, filed an amended answer to the Owens' permanent nuisance petition, setting up the judgment in the condemnation action as being res judicata of the issues in the permanent nuisance case -- that is, that the Owens had recovered in the condemnation action their damages from the presence of the lift

station, including the diminution in value of the remaining portion of land by reason of the stench and the noise of the lift station.

The basic issue upon this appeal is whether the judgment in the condemnation case is res judicata as a matter of law of the issues presented by the permanent nuisance damage suit, so that the condemnation suit judgment is a bar to the present suit.

I

We begin by pointing out that what plaintiffs denominate a claim for "permanent nuisance" is actually a claim for inverse condemnation. Where the nuisance is caused by a municipality in the exercise of a governmental function, is non-tortious, and is not subject to abatement, the municipality is considered

to have appropriated the permanent right, in the nature of an easement, to invade plaintiffs' property. Barr v. KAMO Electric Corp., 648 S.W.2d 616, 618-19, (Mo.App. 1983); Stewart v. City of Marshfield, 431 S.W.2d 819, 822-23 (Mo.App. 1968); Lewis v. City of Potosi, 317 S.W.2d 623, 629 (Mo.App. 1958). The landowner may collect all his damages at once, the measure thereof being the diminution in value of his property by reason of the appropriation. Lewis, 317 S.W.2d at 629; King v. City of Rolla, 234 Mo.App. 16, 24, 130 S.W.2d 697, 701-02 (1939).

II

As noted above, the City's point on this appeal is that plaintiffs received payment in the condemnation award for the damages to their property from the lift

station noise and odor; or that, if they did not receive such payment, they could have received compensation therefor in that proceeding, in either which case they are foreclosed by the doctrine of res judicata from recovering the damages in the second proceeding.

If the damages for which the Owens now claim compensation were reasonably anticipated at the time of the original taking of plaintiffs' property for the lift station, they were obliged to seek them at that time and may not recover them in the present proceeding. Lemon v. Garden of Eden Drainage District, 310 Mo. 171, 182, 275, S.W. 44, 47-48 (1925); Lynch v. St. Louis, K. C. & C. Ry. Co., 180 Mo.App. 169, 168 S.W. 224-225 (1914); 27 Am. Jur. 2d Eminent Domain Section 450 (1966). At that point all damages for

value of property actually taken as well as severance damages, i.e., consequential damages to plaintiffs' remaining property, are to be fixed as best they can be, State ex rel. State Highway Commission v. Galeener, 402 S.W.2d 336, 340 (Mo. 1966), first by the Commissioners and next, upon the exceptions either of the landowner or of the condemnor, by the jury. And the landowner is entitled to receive payment in advance for all damages suffered by him, the measure of which is the value of the property actually taken, and the diminution in value of the remainder of his property by reason of the taking. Lemon, 310 Mo. at 179, 275 S.W. at 46.

Did the owners actually receive payment in the Commissioners' award (which they ultimately accepted) for their damages for the odor and the noise which

began after the lift station began operation? We cannot say as a matter of law that they did.

The pleadings in the condemnation case give us no guidance at all as to the extent of the rights sought by the City beyond the actual land being taken, except as such rights may be inferred from the use to which the land would be put. The petition simply seeks to acquire the fee title to the tract, described by metes and bounds, for the location of the lift station and force main.

The Commissioners' report simply fixes the award, without any clue to what components were included in the award or how the award was arrived at. There was no trial, since the landowners ultimately dismissed their exceptions.

The City points out that the value of the land actually taken was $3,000, according to Mr. Owen's testimony in the present proceeding, and say that "any depreciation in land value caused by noise, odor and vibration . . . would reasonably explain the Commissioners' decision to allow $22,651 for the 1 1/2-acre parcel." There doubtless were, however, other severance damages which are not developed by the evidence and we are in the speculative realm in assuming that any part of the award was for odor and noise. Giving the amount of the award its most persuasive effect, we must say that it is not conclusive that it included compensation for contemplated odor and noise from the lift station.

III

It is not a complete answer to the City's res judicata claim, though, to say that the Owens were not actually awarded compensation for the noise and odor, if they could have claimed and received such compensation and did not do so, the judgment still has a preclusive effect, and the judgment therein bars their present claim. Lemon, 275 S.W. at 47-48; Lynch, 168 S.W. at 225.

The present plaintiffs could have recovered the noise and odor damages if such damages were reasonably anticipated at the time, but not if they were merely possible, or remote, or speculative. Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780, 786 (Mo. 1965); KAMO Electric Cooperative, Inc. v.

Baker, 365 Mo. 814, 287 S.W.2d 858, 862 (1956).

We cannot say as a matter of law, as the City would like us to do, that the odor and noise shown by the evidence in this case were reasonably anticipated at the time of the taking under the City's condemnation petition. It is as of that time, i.e., the time of the taking, that the damages are assessed. KAMO Electric, 287 S.W.2d at 861; Missouri Power & Light Co. v. Creed, 32 S.W.2d 783, 787 (Mo.App. 1930). It has been established by this court in Newman v. City of El Dorado Springs, 292 S.W.2d 314, 318 (Mo.App. 1956), and Hillhouse v. City of Aurora, 316 S.W.2d 883, 887 (Mo.App. 1958), that stench and noise, in the modern state of the art, do not necessarily accompany sewage treatment facilities. See also

Stewart, 431 S.W.2d at 822. The facilities may operate quietly and free of objectionable odor.

The evidence of the present proceeding on the antecedent probability of noise and odor from the operation of the lift station was sparse and conflicting. Mr. Owen testified, "[t]here wasn't to be no smell and no racket" -- that a representative of the City, a Mr. Bob Schaefer, had testified there would be no smell and no noise. (Since there was no trial, such testimony must have been before the Commissioners.) Maintenance man John Joseph Phelan, Jr., on the other hand, testifying in the City's case in chief, was asked whether he had "ever been around sewage at a lift station that didn't have at least some smell." Mr. Phelan answered: "You've gotta be kidding. It

stinks." He further testified: "I'm gonna tell you that I think Mr. Owen's lift station, next door to him, stinks worse than any one we got with the exception of one other that pumps chemicals." Mr. Phelan with another man operated 20 lift stations for the City.

The foregoing shows it was by no means clear that objectionable odor and noise were reasonably to be anticipated at the time of the original taking. Res judicata is usually a question of law, Agnew v. Union Construction Co., 291 S.W.2d 106, 109 (Mo. 1956), but not always. Where it depends upon disputed facts, as in the present case, it becomes a question of fact and must be submitted to the jury for resolution like any other fact dispute. Tutt v. Price, 7 Mo.App. 194 (1879); 50 C.J.S. Judgments Section 846 (1947). See

also Oldham v. Siegfried, 202 S.W.2d 132 (Mo.App. 1947). There was no instruction offered or given which called upon the jury to determine whether the odor and noise complained of by the plaintiffs could reasonably have been anticipated at the time of the original taking.

Res judicata is an affirmative defense. Supreme Court Rule 55.08. It must be pleaded and proved by the party asserting it as a defense. Newton v. Newton, 622 S.W.2d 23, 25 (Mo.App. 1981); Dallas v. Dallas, 233 S.W.2d 738, 744 (Mo.App. 1950). Where the evidence does not establish the defense as a matter of law, as it does not in this case, but where the evidence raises a fact issue, as it does in this case, the party asserting the defense must request an instruction submitting the question to the

jury. Having failed to submit the defense, the City waived it. See State ex rel. State Highway Commission v. City of Washington, 533 S.W.2d 555, 559 (Mo. 1976); Yeager v. Wittels, 517 S.W.2d 457, 465-66 (Mo.App. 1974).

The City then takes a different tack in arguing that, since the odor and noise became apparent while the condemnation case was pending upon the Owens' exceptions, that they were obliged to seek their damages in the condemnation suit; and that, having failed to do so, they are precluded from seeking them in the present separate action for damages.

The condemnation suit, however, determined the damages on the day of taking. Those damages, as we have pointed out above, did not include the unanticipated odor and noise damage. The

claim for the odor and noise damage arose at a later date -- four years later, when the facility went into operation -- and the before-and-after value of plaintiffs' property is determined a of that date. See Newman, 292 S.W.2d at 319; Person v. City of Independence, 114 S.W.2d 175, 179 (Mo.App. 1938). It is a different claim than the claim for damages in the condemnation suit.

Plaintiffs' judgment against the City of Springfield on its permanent nuisance claim is affirmed.

IV

Plaintiffs Owen appeal from adverse verdicts on their temporary nuisance claim against defendant Frank Coluccio Construction Company and the City of Springfield. This claim was based upon alleged tortious trespasses by Coluccio

in the construction of a sewer line upon easements across plaintiffs' land. The work was done by Coluccio under contract with the City of Springfield.

Plaintiffs charge error in that the court entered judgment in favor of both Coluccio and the City, although the jury's verdicts do not name the City of Springfield but only Coluccio. The verdict is on a typewritten form with blanks to be filled in by the jury. The form says:

> On the Claim of plaintiffs John Comer Owen and Bessie E. Owen for temporary nuisance against defendants Frank Coluccio Construction Company and City of Springfield, Missouri, we, the undersigned jurors, find in favor of:
>
> | | |
> |---|---|
> | (Plaintiffs John Comer Owen and Bessie E. Owen) | (Defendants Frank Coluccio Construction Company and City of Springfield, Missouri) |

In the verdict returned by the jury, the space above "(Plaintiffs John Comer Owen and Bessie E. Owen)" is left blank. There is written into the space above "(Defendants Frank Coluccio Construction Company and City of Springfield, Missouri)" only the name of "Frank Coluccio Construction Co."

The typewritten verdict form goes ahead to say:

"Note: Complete the following paragraph only if the above finding is in favor of plaintiffs John Comer Owen and Bessie E. Owen.

"We, the undersigned jurors, assess the damages of plaintiffs John Comer Owen and Bessie E. Owen at $_____." The blank for the amount of damages was left uncompleted by the jury.

Plaintiffs charge error in that the court entered judgment in favor of both Coluccio and the City, although the jury's verdict did not name the City of Springfield but only Coluccio. Plaintiffs claim that such a verdict leaves open, undisposed of and pending their claim against the City. They also claim that the verdict is ambiguous as to both defendants, and that a new trial is required as to both defendants.

We conclude the jury's intent by its verdict is clear when the entire record is considered. The verdict-directing instructions in the case directed a verdict for the plaintiffs against both defendants if the jury found certain hypothesized tortious conduct by Coluccio; there was no hypothesization of any tortious act by the City itself, and no

hypothesization which would allow a verdict for or against either defendant by itself. The verdict was not for plaintiffs against either defendant. The acquittal of agent Coluccio ipso facto acquitted the principal City as well. Pinger v. Guaranty Investment Co., 307 S.W.2d 53, 59 (Mo.App. 1957). The verdict and judgment in this case would be a bar to a later prosecution of the same claim against the City.

We would have a different case if the City's liability were not derivative from that of Coluccio -- as, for example, in the case of Smith v. Welch, 596 S.W.2d 84 (Mo.App. 1980), cited by plaintiffs, where the liability of one of three defendants was based upon his alleged independent acts. The failure of the jury to bring in a verdict disposing of the claim against

him was held to require a remand of the case for a new trial as to him.

Plaintiffs also claim the court erred in admitting certain testimony of witnesses Frank Coluccio, David Baker, O. K. Clark and David Snider on the ground that they had not been disclosed as expert witnesses in answer to an interrogatory of plaintiff, citing Manahan v. Watson, 655 S.W.2d 807 (Mo.App. 1983), and Stephens v. Kansas City Gas Company, 354 Mo. 835, 191 S.W.2d 601 (1946). Witness Coluccio was the owner, and Baker and Clark were employees of Frank Coluccio Construction Company, who had actually participated in the construction work. Their testimony was given in defense of the Owens' claim that Coluccio trespassed outside the bounds of the easement, compacted the ground, did not replace the

top soil, threw beer cans on the property, and created a temporary nuisance. The Owens' evidence in chief had included the testimony of Dr. Harry James, who testified that the soil on the Owens' farm was compacted due to heavy machines; that the soil was disturbed due to the heavy machinery; and that Coluccio did not follow the specifications of the project.

The objected-to testimony of Coluccio, Baker and Clark was that pads, upon which the back hoe rested during the construction work, were used to keep the machine from sinking into the ground; that Coluccio followed the plans and specifications in the construction work; and that the use of the back hoe was necessary in the construction project.

These were not "expert witnesses" in the sense that they were engaged by a

party in anticipation of litigation to testify to scientific or technical matters. They were observers and participants in the events and transactions which the case was about. If some of their testimony incidentally called upon their learning and experience for conclusions and opinions, and could in that sense be called "expert testimony," that does not make them "expert witnesses" within the meaning of Rule 56.01(6)(4). See Krug v. United Disposal, Inc., 567 S.W.2d 133, 135-36 (Mo.App. 1978); Missouri Public Service Company v. Allied Manufacturers, Inc., 574 S.W.2d 509, 511-12 (Mo.App. 1978) (dictum). Plaintiffs were not unfairly surprised or disadvantaged by their testimony. The trial court was well within its discretion

in overruling the plaintiffs' objections to the testimony.

David Snider, director of public works involved in the construction work, was called as a witness by the City. His objected-to testimony related to facts which had no bearing upon the issues in plaintiffs' claim against the City and Coluccio, and could in no way have prejudiced the plaintiffs in their claims against the City or Coluccio.

The judgment upon plaintiffs' temporary nuisance claim against the City and Coluccio is affirmed.

Don W. Kennedy, Special Judge

Crow, C.J., and Robert E. Crist,
William H. Crandall, Jr.,
and William J. Marsh, Sp. JJ., concur.
Greene, P.J., recused.
Titus, J., not participating.

CLERK OF THE SUPREME COURT

STATE OF MISSOURI

POST OFFICE BOX 150

JEFFERSON CITY, MISSOURI

THOMAS F. SIMON TELEPHONE

CLERK (314) 751-4144

November 17, 1987

Mr. Robert Handley

Assistant City Attorney

830 Boonville Avenue

Springfield, Missouri 65802

Mr. Bruce Ring

1602 W. Main

Jefferson City, Mo. 65102

Re: John Comer Owen and Bessie B. Owen vs. City of Springfield, Missouri and Frank Coluccio Construction Company, a Washington corporation, No. 69054

Gentlemen:

This is to advise that the Court this day handed down the opinion attached herewith in the above-entitled cause.

Motions for rehearing must be filed within 15 days from this date (Rule 84.17). The provisions of Rule 44.01(e) do not apply to extend the time for filing motions for rehearing.

Yours very truly,

THOMAS F. SIMON

Mary Elizabeth McHaney

Deputy Clerk, Court en Banc

Attachment

cc: Mr. John G. Newberry

SUPREME COURT OF MISSOURI

en banc

No. 69054

JOHN COMER OWEN and

BESSIE B. OWEN

Plaintiffs (Respondents

and Cross-Appellants),

vs.

CITY OF SPRINGFIELD, MISSOURI,

Defendant (Appellant

and Cross-Respondent)

and

FRANK COLUCCIO CONSTRUCTION COMPANY

a Washington corporation,

Defendant (Respondent)

APPEALS FROM THE

CIRCUIT COURT OF GREENE COUNTY

Honorable Max E. Bacon, Judge

John Comer Owen and Bessie Owen had a verdict for $40,875 damages against the City of Springfield on a claim that the City's sewage lift station constructed and operated near their home constituted a permanent nuisance. Mr. and Mrs. Owen were denied a verdict on their claim for damages for temporary nuisance against the City and Frank Coluccio Construction Company. Judgment was rendered accordingly. Defendant City appealed from that part of the judgment which awarded plaintiffs $40,875 in damages; plaintiffs appealed that part of the judgment which denied their claim for damages for temporary nuisance. The Court of Appeals, Southern District, affirmed the judgment. This Court transferred the case to review whether Mr. and Mrs. Owen were foreclosed in this proceeding by recovery in a prior

condemnation proceeding affecting the same land. The judgment on the award of $40,875 to plaintiffs is reversed, and is otherwise affirmed.

On December 30, 1977, the City of Springfield filed a Petition In Condemnation in furtherance of certain sewage projects to be constructed in accordance with a plan of the Public Works Department filed with the petition.

The City sought to take approximately 1-1/2 acres from the 109 acre farm of defendants John Comer and Bessie E. Owen to construct the James River Lift Station. The lift facility was designed to receive and pump approximately 6,000,000 gallons of raw sewage per day, utilizing two 400-horsepower, 4,200 gallons-per-minute pumps, and to vent the sewer fumes and gases to the atmosphere. It was to be

located approximately 100 yards from the Owen residence.

The City's petition prayed that commissioners be appointed "to ascertain and assess the damages . . . the defendants as owners of the tracts of land . . . , may sustain by reason of taking, condemnation and appropriation of such tracts of land and the just compensation to which defendants may be entitled in the consequence of the taking, condemnation and appropriation of said tracts of land."

Mr. Owen valued the 1-1/2 acre tract taken at $3,000.00. The commissioners awarded Mr. and Mrs. Owen a total of $22,651.00 for the taking and its consequential damages. The commissioners' report was filed April 28, 1978.

On May 10, 1978, Mr. and Mrs. Owen filed their exception to the

commissioners' award thus preserving their right to jury trial on the damages sustained as a result of the City's condemnation and use of their property.

The lift station was constructed and placed in operation in January 1981; Mr. and Mrs. Owen immediately experienced sewage odors and engine noise emanating from the lift facility.

Notwithstanding existence and pendency of the right to jury trial on their exception to the damages awarded resulting from the condemnation and construction of the sewage facility, Mr. and Mrs. Owen had, on September 10, 1980, filed a petition in inverse condemnation which, as subsequently amended, served as plaintiffs' pleading at the trial which gave rise to this Court's consideration of the issues between Mr. and Mrs. Owen and

the City of Springfield. Plaintiffs alleged in Count VIII of their petition that the lift station "will create additional noise and vibration and noxious odors and sewage fumes." Although plaintiffs style their claim and action for "permanent nuisance" it is in the nature of and treated here as a claim for inverse condemnation. Where the nuisance is caused by a municipality in the exercise of a governmental function and is non-tortious, the same is not subject to abatement and the municipality is considered to have appropriated the permanent right, which is in the nature of an easement, to invade landowners' property. Barr v. KAMO Elec. Coop., 648 S.W.2d 616, 618-19 (Mo. App. 1983); Stewart v. City of Marshfield, 431 S.W.2d 819, 822-23 (Mo. App. 1968); Lewis v. City

of Potosi, 317 S.W.2d 623, 629 (Mo. App. 1958). The landowner may collect all his damages at once, the measure thereof being the diminution in value of his property by reason of the appropriation. Lewis, 317 S.W.2d at 629; King v. City of Rolla, 234 Mo. App. 16, 24, 130 S.W.2d 697, 701-02 (1939).

On June 10, 1982, Mr. and Mrs. Owen dismissed their exception to the commissioners' award. Because the City had filed no exception, the Owens' dismissal terminated the condemnation suit and fixed the Owen's damages at $22,651.00, for and as a result of the taking of their property for the purposes expressed.

The City's answer to the inverse condemnation suit instituted by Mr. and Mrs. Owen set up the original condemnation

proceeding and damage award as a bar of res adjudicata to the issues they sought to have addressed under their petition for inverse condemnation.

There is no disagreement between Mr. and Mrs. Owen and the City that plaintiffs' suit sought damages for permanent noise and odor "unavoidably caused in the operation of the lift station." Plaintiffs' theory was so substituted in their verdict-directing Instruction No. 43. The question then is whether Mr. and Mrs. Owen had the opportunity to tender such claim in the prior condemnation suit before their dismissal of exception brought it to final judgment. If so, they were precluded from the verdict in question by the final judgment in the prior suit.

In Powell, et al., v. City of Joplin, 72 S.W.2d 408 (Mo. 1934), this Court recognized the "familiar rule" that a judgment is conclusive not only as to questions which were raised, but as to every question which could have been raised. The Court applied the rule to affirm the dismissal of a representative suit filed subsequent to a merits resolution of a prior representative suit. In Winthrop Sales Corporation v. Shelton, et al., 389 S.W.2d 70 (Mo. App. 1965), the court held that the failure to tender an issue which is available prior to rendition of the judgment precludes its being raised thereafter in a proceeding between the same parties involving the same thing. In Smith v. City of Sedalia, 149 S.W. 597 (Mo. banc 1912), this Court held that an action for injunction to

abate an alleged permanent nuisance was barred by a pending suit for damages where both suits sought relief on account of the City's discharge of sewage into a watercourse running through Smith's land.

Damages incidental or consequent to a condemnor's use of land for the purposes acquired are subject to consideration in the condemnation case and are subject to assessment by jury upon exceptions duly filed. See Citizens Electric Corp. v. Amberger, et al., 591 S.W.2d 736 (Mo. App. 1979); KAMO Electric Cooperative, Inc., v. Baker, 287 S.W.2d 858 (Mo. 1956); Jones v. St. Louis Iron Mountain and Southern Ry. Co., 84 Mo. 151 (1884); McCormick v. Kansas City, St. Joseph and Council Bluffs R.R. Co., 57 Mo. 433 (1874); and Clark's Administratrix v. Hannibal & St. Joseph Ry. Co., 36 Mo. 202 (1865).

In the original condemnation action the City gave notice to the Owens through its petition and construction plan that the sewage facility on their land would utilize heavy duty pumps to handle 6,000,000 gallons of raw sewage per day, venting its fumes and gases to the atmosphere. This knowledge was in addition to general knowledge that raw sewage has an offensive odor and that heavy duty pumps produce noise. These items were submitted as the "unavoidable damages" in the second cause of action; and it is not sufficient to argue that the second cause of action was for something different, "unanticipated damages." The Owens were advised by the plan that they could expect and anticipate odor and noise; and they did in fact experience odors and noise at a time when their

condemnation exception was still pending. Both items of damage were cognizable in the original condemnation action and the commissioners did award the Owens $22,651.00 for the value of the land taken and the consequential damages occasioned by the taking.

In these circumstances, plaintiffs had their day in court in the original condemnation action and are barred from a second day in court on the same issues.

With respect to plaintiffs' appeal from denial of their claim for temporary nuisance damages, this Court adopts without further attribution the following substance of the opinion of the Court of Appeals.

This claim was based upon alleged tortious trespasses by Coluccio in the construction of a sewer line upon

easements across plaintiffs' land. The work was done by Coluccio under contract with the City.

Appellants charge error in that the court entered judgment in favor of both Coluccio and the City, although the jury's verdicts do not name the City but only Coluccio. The verdict is on a typewritten form with blanks to be filled in by the jury. The form says:

> On the claim of plaintiffs John Comer Owen and Bessie E. Owen for temporary nuisance against defendants Frank Coluccio Construction company and City of Springfield, Missouri, we, the undersigned jurors, find in favor of:

(Plaintiffs John Comer Owen and Bessie E. Owen)	(Defendants Frank Coluccio Construction Company and City of Springfield, Missouri)

In the verdict returned by the jury, the space above "(Plaintiffs John Comer Owen and Bessie E. Owen)" is left blank. there is written into the space above "(Defendants Frank Coluccio Construction Company and City of Springfield, Missouri)" only the name of "Frank Coluccio Construction Co."

The typewritten verdict form goes ahead to say:

"We the undersigned jurors, assess the damages for plaintiffs John Comer Owen and Bessie E. Owen at $_____." The blank for the amount of damages was left uncompleted by the jury.

Appellants claim that such verdict leaves open, undisposed of and pending their claim against the City. They also claim that the verdict is ambiguous as to

both defendants, and that a new trial is required as to both defendants.

The jury's intent by its verdict is clear when the entire record is considered. The verdict-directing instructions in the case directed a verdict for the plaintiffs against both defendants if the jury found certain hypothesized tortious conduct by Coluccio; there was no hypothesization which would allow a verdict for or against either defendant by itself. The verdict was not for plaintiffs against either defendant. The acquittal of agent Coluccio ipso facto acquitted the principal City as well. Pinger v. Guaranty Investment Co. 307 S.W.2d 53, 59 (Mo. App. 1957). The verdict and judgment in this case would be a bar to a later prosecution of the same claim against the City.

The case would be different if the City's liability were not derivative from that of Coluccio -- as, for example, in the case of Smith v. Welch, 596 S.W.2d 84 (Mo. App. 1980), cited by appellants, where the liability of one of three defendants was based upon his alleged independent acts. The failure of the jury to bring in a verdict disposing of the claim against him was held to require a remand of the case for a new trial as to him.

Appellants also claim the court erred in admitting certain testimony of witnesses Frank Coluccio, David Baker, O. K. Clark and David Snider on the ground that they had not been disclosed as expert witnesses in answer to interrogatory of plaintiffs, citing Manahan v. Watson, 655 S.W.2d 807 (Mo. App. 1983), and Stephens

v. Kansas City Gas Company, 354 Mo. 835, 191 S.W.2d 601 (1946). Witness Coluccio was the owner, and Baker and Clark were employees of Frank Coluccio Construction Company, who had actually participated in the construction work. Their testimony was given in defense of plaintiffs' claim that Coluccio trespassed outside the bounds of the easement, compacted the ground, did not replace the topsoil, threw beer cans on the property, and created a temporary nuisance. The plaintiffs' evidence in chief had included the testimony of Dr. Harry James, who testified that the soil on the plaintiffs' farm was compacted due to heavy machines; that the soil was disturbed due to the heavy machinery; and that Coluccio did not follow the specifications of the project.

The objected-to testimony of Coluccio, Baker and Clark was that pads, upon which the backhoe rested during the construction work, were used to keep the machine from sinking into the ground; that Coluccio followed the plans and specifications in the construction work; and that the use of the backhoe was necessary in the construction project.

These were not "expert witnesses" in the sense that they were engaged by a party in anticipation of litigation to testify to scientific or technical matters. They were observers and participants in the events and transactions of the case. If some of their testimony incidentally called upon their learning and experience for conclusions and opinions, and could in that sense be called "expert testimony,"

that does not make them "expert witnesses" within the meaning of Rule 56.01(6) (4). See Krug v. United Disposal, Inc., 567 S.W.2d 133, 135-36 (Mo. App. 1978); Missouri Public Service Company v. Allied Manufacturers, Inc., 574 S.W.2d 509, 511-12 (Mo. App. 1978) (dictum). Plaintiffs were not unfairly surprised or disadvantaged by their testimony. The trial court was well within its discretion in overruling the plaintiffs' objections to the testimony.

David Snider, director of public works involved in the construction work, was called as a witness by the City. His objected-to testimony related to facts which had no bearing upon the issues in plaintiffs' claim against the City and Coluccio and could in no way have

prejudiced them in their claims against the City and Coluccio.

Accordingly, the judgment for damages in favor of plaintiffs against the City is reversed and the cause is remanded with direction to enter judgment against plaintiffs on their temporary nuisance claim against the City and defendant Coluccio is affirmed.

ANDREW JACKSON HIGGINS, Judge

BLACKMAR, DONNELLY,
WELLIVER and ROBERTSON, JJ.,
concur; RENDLEN, J.,
dissents in separate
opinion filed; BILLINGS, C.J.,
dissents and concurs in
separate dissenting opinion
of Rendlen, J.

SUPREME COURT OF MISSOURI

en banc

No. 69054

JOHN COMER OWEN and

BESSIE B. OWEN

Plaintiffs (Respondents

and Cross-Appellants),

vs.

CITY OF SPRINGFIELD, MISSOURI,

a municipal corporation,

Defendant (Appellant

and Cross-Respondent)

and

FRANK COLUCCIO CONSTRUCTION COMPANY

a Washington corporation,

Defendant (Respondent)

DISSENTING OPINION

For the reasons following, I respectfully dissent.

"Res judicata" literally translated means the matter has been adjudged. As a working legal principle it includes a "thing definitely settled by judicial decision, judicial judgment or judicial opinion." (Emphasis added.) Smith v. Smith, 299 S.W.2d 32, 35 (Mo. App. 1957). The doctrine embodied in the concept provides a complete bar to any subsequent action; however, res judicata is an affirmative defense, Rule 55.08, which must be pleaded and proved by the party asserting it. Newton v. Newton, 622 S.W.2d 23, 25 (Mo. App. 1981); Dallas v. Dallas, 233 S.W.2d 738, 734 (Mo. App. 1950).

In some cases applicability of res judicata is determinable merely from an inspection of the record and becomes a question of law for the court. Agnew v.

Union Construction Co., 291 S.W.2d 106, 109 (Mo. 1956). However, when as here its application requires extrinsic evidence it becomes a question of fact and must go to the jury. Tutt v. Price, 7 Mo. App. 194 (1979); 50 C.J.S. Judgments sec. 846 (1947). Because the availability of the affirmative defense in this case rested on the presentation of extrinsic evidence, it was incumbent on the City to request an instruction submitting the question to the jury, State ex rel. Highway Comm. v. City of Washington, 533 S.W.2d 555, 559 (Mo. 1976), and despite a warning to the City during the instruction conference that the issue was one for the jury, it failed or elected not to offer such instruction thereby waiving and foreclosing its affirmative defense. Id.

The meager record before us indicates that on December 30, 1977 the City sought to condemn and carve approximately 1-1/2 acres from the Owens' 109 acre farm home in Greene County. The condemnation petition described the land to be taken as tract No. 1 James River Lift Station and Force Main. In the sparsest terms it described the City's purpose in condemning the land as:

> to construct the James River Lift Station, the Ward Branch Trunk Sewer and James River Interceptor and to maintain public sanitary sewers for said City.

The order of taking was granted and the Commissioners appointed to assess damages concluded their duties by filing a report on April 28, 1978 fixing damages to the Owens for appropriation of land for the lift station at $22,651.

The lift station was subsequently constructed approximately 100 yards from the Owens' home, and when placed in operation during January 1981, began to emit foul odors and emanate excessive noise. The station constructed employs two 400-horse power electric pumps which operate alternately forcing untreated sewage through an inclined 24-inch force main a distance of 13,000 feet to a higher elevation. The pumps operate from 6 to 24 hours per day, and there is an additional 185 horse power diesel generator for emergency power which is run for testing purposes once each week. As a part of the total system, a variety of fans and pumps contribute to the resulting noise level. An employee of the City involved in the operation and maintenance of pump stations described how raw sewage is collected from

a large geographic area by gravity lines in a large open reservoir at the lift station known as a "wet well." He admitted that raw human waste is gathered in this reservoir and that during this process the waste "ferments," heightening the malodorous fumes emitted by the system. From the "wet well" this fermented sewage is pumped into the force main by the machinery housed on the 1-1/2 acre plot.

Witnessing these sorry developments, the Owens filed the present suit for permanent nuisance and in June 1982 dismissed their exceptions in the condemnation proceeding. Because the City had filed no exceptions to the Commissioners' report, the Owens' dismissal terminated that action.

In this suit for permanent nuisance,[1] The City filed its amended answer alleging the judgment in the condemnation action as res judicata and a bar to the claims presented here. The City argued the award of damages in early 1978 for taking the land by condemnation included the diminution in value to the remaining portion of the Owens' property occasioned by stench and noise emanating after January 1981 from operation of the plant, or that if it did not, the Owens could have received compensation in the original

---

[1] Although Homeowners claim is styled an action for "permanent nuisance" it is in the nature of and treated here as a claim for inverse condemnation. When a public body or corporation having the power of eminent domain commits an act or creates a permanent nuisance affecting land, the cause of action for damages to the land is determined by the law of eminent domain and a suit for such damages is by the demand for permanent damage converted to an action in the nature of condemnation.

proceeding. The defendant City concludes that in either instance the Owens are foreclosed as a matter of law by the doctrine of res judicata from recovering damages in the current proceeding.

The majority opinion falls into the trap of confusing res judicata as a matter of law with res judicata as a question of fact and erroneously makes a quantum leap from an insufficient record to its conclusion reversing the jury's verdict as a matter of law. In so doing the majority fails to view the evidence in the light most favorable to the plaintiffs and accord them the benefit of all reasonable inferences. Boyle v. Colonial Life Ins. Co. of America, 525 S.W.2d 811, 815 (Mo. App. 1975). Instead they seize upon certain pieces of contrary evidence and gratuitously infer that the original award

must necessarily have included some damages for smell and noise.[2] It then infers that this damage necessarily, as a matter of law, included the excessive and unusual odors and noise which finally occurred and became thereafter known to the Owens; or alternatively, that such excessive odor and noise level could have been anticipated and if damages therefor were not included, they should have been.

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[2] At the outset, the City would have us believe the stench and noise are not excessive, and it goes without saying that was the position it adopted when making its presentation to the condemnation petitioners. Mr. Owen stated that a City employee had testified to the Commissioners that there would be no noise and no smell. The City obviously wanted the Commissioners to believe that assertion or conclude that any noise and stench would be minimal. While it may be conceded that the Commissioners' award perhaps included an amount for smell and noise, it cannot be said as a matter of law that the award contemplated the enormity of the noxious result later created near the Owens' home.

By accepting this argument the majority heaps inference on inference and overlooks the record which belies the inferences so indulged. Simply put, the majority mistakenly relieves the City of the burden of proving its affirmative defense by the preponderance of the evidence. As the court so aptly stated in Boyle:

> "The burden of proving the affirmative defense pleaded by defendant was upon defendant. * * * It is the established rule in this State that, where plaintiff has made out a prima facie case, it is beyond the power of the trial court to direct a verdict in favor of defendant where defendant has the burden of establishing an affirmative defense, unless such defense is conclusively established by evidence which is conceded by plaintiff to be true, or is established by documentary evidence which is of such a character as to be binding upon plaintiff and thereby to estop him from denying it." [Emphasis in original.]
>
> In reviewing the action of a trial court in ruling on defendant's motion for a directed verdict (whether ruled at the close of plaintiff's evidence or

> at the close of all the evidence, and whether sustained or overruled) the reviewing court must determine whether plaintiff made a submissible case, and in so doing, the plaintiff is entitled to the most favorable view of all the evidence and must be given the benefit of all favorable inferences to be drawn therefrom.

Id. at 815 (citations omitted). The majority opinion evinces a convenient disregard of these precepts.

The petition in the condemnation proceeding provides little guidance concerning the extent of the rights sought by the City beyond the description of the land being taken, except as such as might be inferred from the use to which the land would be put. As set forth above, the petition sought in the barest terms to acquire fee title to the tract, described by metes and bounds, for the location of the lift station and force main. The Commissioners' report merely fixes the

award at a dollar amount without specifying the damages contemplated. This is the only documentary evidence in the record bearing on the issue of res judicata, and it cannot fairly be said that it is of such a nature as to conclusively prevent or estop plaintiffs from denying or contesting the claim of res judicata. The majority opinion concludes that the petition and "construction plan" provided the Owens with sufficient notice that the lift station would produce the vile stench and excessive noise of which they now complain. However, the "construction plan" referred to by the majority is not part of the record here and we know neither of its terms nor its conditions. By law we are confined to consideration of the record presented and it is manifest

error to rely upon evidence not contained in the record. Williams v. Cleon Coverall Supply Co., Inc., 613 S.W.2d 659, 664 (Mo. App. 1981). We have properly before us only the original petition, the order of taking and the Commissioners' report. Even if (contrary to the proper standard of review) the record is construed most favorably to defendants, it provides no basis for a determination that plaintiffs' claim is barred as a matter of law by the doctrine of res judicata.

The City next contends that the value of the land actually taken was only $3,000, according to Mr. Owen's testimony in the present proceeding, and urges that "any depreciation in land value caused by noises, odor and vibration . . . would reasonably explain the Commissioners' decision to allow $22,651 for the 1 1/2-

acre parcel." While arguably the Commissioners may have considered the possibility of some odor and offensive noise, the likelihood that this would occur was reduced and minimized by a City employee who testified before the Commission that there would be no noise and no smell. See Note 2, supra. For us to blandly assert the extent to which such possibility might have been or was in fact considered by the Commissioners calls for speculation and guesswork in which we may not indulge. Putting aside for the moment the proper standard of review, an overly charitable construction of the award and consideration of inferences favorable to the City indicates only that the award may have contemplated some damage from noise and smell, but it cannot be said as a matter of law that the award

included compensation for the unusually vile stench and excessive noise which eventuated.

Turning now to the closely related question of whether the Owens might have recovered in the condemnation action the damages they later sought in the permanent nuisance claim, I agree that if the damages for which the Owens now claim compensation were reasonably anticipated at the time of the original taking of their property for the lift station, they were obliged to seek them at that time and may not recover in the present proceeding. Lemon v. Garden of Eden Drainage District, 310 Mo. 171, 182, 275 S.W. 44, 47-48 (1925); Lynch v. St. Louis, K.C. & C. Ry. Co., 180 Mo. App. 169, 168 W.S. 224-25 (1914); 27 Am. Jur.2d Eminent Domain Sec. 450 (1966). At that point all damages for

value of property actually taken, as well as severance damages, i.e., consequential damages to plaintiffs' remaining property, are to be fixed as best they can be, State ex rel. State Highway Commission v. Galenner, 402 S.W.2d 336, 340 (Mo. 1966), first by the Commissioners and next, upon the exceptions either of the landowner or of the condemnor, by the jury. The Owens could have recovered damages for the noise and stench in the condemnation proceedings if such damages were reasonably anticipated at the time, but not if they were merely possible, remote or speculative. Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780, 786 (Mo. 1965); KAMO Electric Cooperative, Inc. v. Baker, 365 Mo. 814, 287 S.W.2d 858, 862 (1956).

I believe it cannot be said, from a fair evaluation of the evidence supportive of the verdict and the trial court's ruling, that as a matter of law the unusual degree of stench and noise shown by the evidence in this case could have been reasonably anticipated at the time of the taking under the City's condemnation petition. The evidence in the present case on the antecedent probability of noise and stench from the operation of the lift station, although sparse, was telling. Mr. Owen testified, "[t]here wasn't to be no smell and no racket." He further stated that a representative of the City had testified before the Commissioners that there would be no smell and no noise. This affirmative evidence was for the jury to consider and indicates that in the condemnation proceeding it was

made clear to these landowners and the Commissioners by those involved on behalf of the City that there would be no stench or "racket." This testimony alone was sufficient to make a submissible case. Moreover, the City made admissions through a key employee which indicated that the degree of noise and stench in this case could not have been reasonably anticipated at the time of the condemnation proceedings. Maintenance man John Phelan, Jr., who is involved in the operation of 20 lift stations for the City, testifying in the City's case in chief, was asked whether he had "ever been around sewage at a lift station that didn't have at least some smell." Phelan answered: "You've gotta be kidding. It stinks." then this principal witness for the City admitted, "I'm gonna tell you that I think Mr.

Owen's Lift station, next door to him, stinks worse than any one we got with the exception of one other that pumps chemicals. (Emphasis added.) Phelan's concession is noteworthy because it indicates that although he believes some smell is an unavoidable consequence of sewer plant operations, the lift station in questions "stinks worse" than typical plants. This testimony, too, made the issue of what damages could be reasonably anticipated at the time of taking in early 1978 a question of fact for the jury, and this Court may not say that as a matter of law the unusually noxious stench and noise which occurred many years later were necessarily to be anticipated at the time of the original taking.

The City then takes the slightly different position, seemingly adopted by

the majority, that because the odor and noise became apparent while the condemnation action was pending on the Owens' exceptions, they were obliged to seek their damages in the condemnation action, and having failed to do so they are now precluded from seeking them in this separate action for damages. The condemnation suit, however, determined the trespass on the day of taking. Those damages, as noted above, could not have included an unanticipated level of stench and excessive noise. The before-and-after value of the Owens' property was determined four years prior to their claim seeking compensation for the extraordinary stench and noise which only arose after the facility went into operation. See Newman, 292 at 319; Person v. City of

Independence, 114 S.W.2d 175, 179 (Mo. App. 1938).

In sum, because the plea of res judicata was not determinable from an inspection of the record alone it was not a question of law for the court. Instead, application of the doctrine here required extrinsic evidence and it became a question of fact for the jury. The Owens made a submissible case; notwithstanding that fact the City as a matter of trial strategy elected not to submit its affirmative defense to the jury and thereby waived the issue. Accordingly, I believe the trial court properly denied the City's motion for judgment notwithstanding the verdict.[3]

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[3] On appeal the City raises other claims of trial error which were fully considered and found to be without merit by the Court of Appeals. My examination of those claims indicates they were

ALBERT L. RENDLEN, JUDGE

properly denied and provide no basis for reversal.

CLERK OF THE SUPREME COURT

STATE OF MISSOURI

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JEFFERSON CITY, MISSOURI

THOMAS F. SIMON

CLERK

TELEPHONE

(314) 751-4144

December 2, 1987

Mr. John G. Newberry

2135 East Sunshine - Suite 203

Springfield, MO 69054

In re: John Comer Owen, et ux vs.
City of Springfield, et al.,
No. 69054

Dear Mr. Newberry:

This is to acknowledge receipt of an original and seven copies of respondents/ cross-appellants' motion for rehearing which have this day been filed in the above entitled cause with service.

Yours very truly,

THOMAS F. SIMON

Mary Elizabeth McHaney

Deputy Clerk, Court en Banc

SUPREME COURT OF MISSOURI

No. 69054

JOHN COMER OWEN and

BESSIE B. OWEN

Plaintiffs (Respondents
and Cross-Appellants),

vs.

CITY OF SPRINGFIELD, MISSOURI,
a municipal corporation,

Defendant (Appellant
and Cross-Respondent,

and

FRANK COLUCCIO CONSTRUCTION COMPANY,
a Washington corporation,

Defendant (Respondent).

MOTION FOR REHEARING

John Comer Owen and Bessie B. Owen, respondents and cross-appellants, plaintiffs below, move the Court, pursuant

to Supreme Court Rule 84.17, for rehearing on the issue of damages said parties suffered arising and resulting from tortious actions and omissions to act of the City of Springfield, Missouri, appellant and cross-respondent, defendant below, which caused noxious odors, noises and other interference with the use and enjoyment of said parties' property through the operation of a sewage lift station, on the following grounds:

I.

By its opinion, the majority of the Court has held that a municipality may condemn a right to commit tortious acts. The majority states that the Owens, and the Court itself, on the date of actual condemnation, could conclude from the plans and specifications for the sewer lift station, filed by the City of

Springfield, Missouri, that said municipality was going to commit a legal wrong of releasing noxious odors and loud noises, which are of no benefit to the public but are wrongful as to adjoining landowners, including the Owens.

A municipality has Constitutional and statutory power to condemn for non-tortious, lawful purposes only. When such power of condemnation is exercised, it is assumed the condemning authority is acting for lawful purpose even as it exercises its power to take another's property without his consent.

The Fifth Amendment to the United States Constitution, as well as Article I, Section 26 of the Constitution of the State of Missouri, provide that private property shall not be taken for public use without just compensation. Moreover, the

Fourteenth Amendment of the United States Constitution precludes any State from depriving "any person of life, liberty or property, without due process of law".

The constitutional protections above-cited, historically interpreted, preclude any governmental authority, such as the City of Springfield, Missouri, from committing a legal wrong by virtue of the power to condemn.

The opinion of the majority of the Court compounds the error of its reasoning, and carves out a much broader scope of condemnation than contemplated by the Federal and Missouri constitutions, by holding the landowner must pursue by exception to condemnation that which may not be condemned. The majority holds the Owens must have pursued, in condemnation proceedings, the tortious damages

resulting from the municipality's actions and omissions to act after the taking occurred, and were thereby prevented from suing the municipality in a separate action for damages based on tort.

Movants herein respectfully submit that the doctrine of res judicata, relied upon as precluding a separate action for the legal wrongs of the City of Springfield, Missouri, cannot apply because the City had no power to condemn to maintain a private nuisance.

Authority is abundant in support of the proposition that the City of Springfield, Missouri, or any other condemning authority, cannot use evidence of its actual wrongdoing to support an affirmative defense of res judicata in an action for nuisance. That is, the condemning authority cannot rely on what

has actually occurred as proof of what would have been reasonably contemplated to happen as part of the actual use of the condemned property, when the actual use turned out to be a wrongful and tortious act.

If the City of Springfield, Missouri, cannot use evidence of its actual wrongdoing to support an affirmative defense of res judicata, how can it be said that the filing of plans and specifications (even if they stated the sewer lift station would create odors and noises -- which they did not), relieve the City of the legal fact that it can only condemn for public use, not for the purpose of committing an actionable nuisance against adjoining landowners.

The paradoxical error of the majority's opinion can best be found in the

last sentence of Page 3 thereof: "Where the nuisance is caused by a municipality in the exercise of a governmental function and is non-tortious, the same is not subject to abatement and the municipality is considered to appropriated the permanent right, which is in the nature of an easement, to invade the landowners' property." By definition, a "nuisance" cannot be "non-tortious".

Nuisance is a classic tort, a "legal wrong committed upon the person or property, independent of contract", Black's Law Dictionary, Revised Fourth Edition, Page 1660. The Owens pleaded and proved not only that the City of Springfield, Missouri, operated a sewer lift station, but that it wronged them tortiously by creating noises and sewage odors, offensive to persons of ordinary

sensibilities, substantially diminishing their use and enjoyment of their property, as was submitted in plaintiffs' jury instructions.

The rule that a municipality, forced to pay damages in a nuisance action, may thereafter continue the nuisance through "inverse condemnation", does not make the nuisance a subject of the statutory condemnation proceedings.

II.

The majority opinion has misapplied the doctrine of res judicata. The fact that the defense of res judicata must be affirmatively pleaded, proved and submitted to the trier of fact, has been ignored. As recognized in the Dissenting Opinion, Supreme Court Rule 55.08, specifically includes "res judicata"

among those affirmative defenses which are waived if not asserted.

The City of Springfield, Missouri, pleaded res judicata as an affirmative defense, but then neither offered evidence to support its defense, nor requested that the jury be instructed as to such defense. Had such defense been pursued, rather than abandoned, the City was bound to request a finding of fact, based on the evidence, that on the day of condemnation the Owens could have reasonably anticipated that the lift station would create offensive smells and noises.

The majority of the Court has reached dehors the record, usurping the function of the jury to determine facts, raising an affirmative defense sua sponte and deciding same in favor of the City of Springfield, Missouri, based on its own

opinion that the landowners could have anticipated noise and smell from a sewer lift station on the day of condemnation.

Ownership, use and peaceful enjoyment of property is a fundamental right of American citizens, recognized and protected since the inception of this nation. The power of a governmental authority to condemn, in derogation of this fundamental right, has been and should be strictly construed and limited as the framers of our Constitution intended. When the Court adopts a liberal philosophy of "cleaning up" for a governmental entity who has not undertaken a proper condemnation, or who has exceeded by tortious acts the condemnation it has perfected, or who abandons whatever rights it does have in the public courts, it is embarking on a perilous and

unprecedented course, which may be readily changed if this Court grants to John Comer Owen and Bessie B. Owen the rehearing and relief they seek.

Respectfully Submitted,

SCHROFF, GLASS & NEWBERRY, P.C.

By _____
John G. Newberry #27300

_____
John B. Newberry #14795

CLERK OF THE SUPREME COURT

STATE OF MISSOURI

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December 15, 1987

Mr. John G. Newberry

2135 East Sunshine, Suite 203

Springfield, Missouri 65804

Re: John Comer Owen and Bessie E. Owen vs. City of Springfield, Missouri, a municipal corporation and Frank Coluccio Construction Company, a Washington corporation, et al., No. 69054

Dear Mr. Newberry:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Respondents/Cross-Appellants' motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon

Clerk

cc: Mr. Bruce Ring

Mr. Howard C. Wright, Jr.

and

Mr. Robert H. Handley

Ms. Lynn C. Rodgers

Mr. Warren S. Stafford

Mr. Frank M. Evans, III

and

Mr. Craig R. Oliver